STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED March 18, 2008

Plaintiff-Appellee,

V

No. 275781 Monroe Circuit Court LC No. 06-035201-FH

DEMETRIC ROSHARD MCGOWAN,

Defendant-Appellant.

Before: Murray, P.J., and Bandstra and Fort Hood, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver between 50 and 449 grams of cocaine, MCL 333.7401(2)(a)(iii), felon in possession a firearm, MCL 750.224f, possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and carrying a concealed weapon, MCL 750.227. The trial court sentenced defendant, as a third habitual offender, MCL 769.11, to 195 months to 40 years in prison for the possession with intent to deliver between 50 and 449 grams of cocaine conviction, 34 months to 10 years in prison for the felony-firearm conviction, and 34 months to 10 years in prison for the carrying a concealed weapon conviction. Defendant appeals as of right. We affirm.

Police received an anonymous tip of drug use at an apartment, received consent from the resident to conduct a search, and discovered drugs in the apartment. The apartment occupant was on parole and agreed to arrange a purchase for three and one-half ounces of cocaine from her supplier, defendant. Defendant called the occupant turned informant when he was on his way with the drugs. When he arrived, defendant was arrested carrying three and one-half ounces of cocaine and a gun. Conversely, defendant claimed that he merely carried three and one-half grams of cocaine. Defendant asserted that he did not intend to deliver the cocaine, but rather, it was for his own personal use. He further testified that he came to visit the informant for commercial sex.

First, defendant alleges that the trial court erred in refusing to allow him to question the informant regarding her occupation as a prostitute. On cross-examination, defense counsel inquired what the informant did for a living at the time of the charged offenses. She stated that she did not want to answer. The prosecutor objected based on relevancy grounds. A discussion was held outside the presence of the jury. In the discussion, defense counsel alleged that the police officers did not hear the conversation setting up the drug transaction, contrary to the trial

testimony. He asserted that the informant set up a transaction for sex rather than drugs. Defense counsel also indicated that he wanted to question the informant regarding what she was wearing because, upon information and belief, she was dressed as a "call girl." The trial court excluded the testimony based on relevancy grounds. The trial court also held that the informant was not provided with immunity and had a right to be free from self-incrimination. The trial court further stated that defendant's purpose for visiting the informant's residence, whether to engage in sexual acts or to watch football, was irrelevant with regard to his intent or the reason for having drugs on his person. Defendant asserts that the exclusion of this line of questioning and testimony deprived him of a substantial defense and shifted the burden of proof. We disagree.

This Court reviews claims regarding the denial of the constitutional right to present a defense de novo. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002). No person may be deprived of life, liberty, or property without due process of law. US Const, Ams V, XIV, § 1; Const 1963, art 1, § 17; *People v Bearss*, 463 Mich 623, 629; 625 NW2d 10 (2001). A defendant in a criminal case has the right to present a defense. US Const, Ams VI, XIV; Const 1963, art 1, § 13; *Kurr*, *supra* at 326. However, "[i]t is well settled that the right to assert a defense may permissibly be limited by 'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *People v Toma*, 462 Mich 281, 294; 613 NW2d 694 (2000), quoting *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973).

"The decision whether to admit evidence is within a trial court's discretion." *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). Evidence that is relevant is admissible. *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001); MRE 402. To determine if evidence is relevant under MRE 401, a reviewing court must examine: (1) the materiality of the evidence, and (2) "whether the evidence makes a fact of consequence more or less probable than it would be without the evidence." *People v Mills*, 450 Mich 61, 66-67; 537 NW2d 909 (1995). A fact is material if it is within the range of litigated matters in controversy. *Id.* at 68.

Both the federal and state constitutions provide the witness with a privilege against self-incrimination. *People v Dyer*, 425 Mich 572, 578; 390 NW2d 645 (1986). The trial court may compel the witness to answer a question only when it is apparent that the testimony will not incriminate the witness. *Id.* at 578-579. A defendant does not have the power to immunize witnesses and cannot compel a grant of immunity. *People v Lawton*, 196 Mich App 341, 346; 492 NW2d 810 (1992). Testimony is protected against compelled disclosure when there is even a possibility of incrimination. *Id.*

Irrespective of the asserted relevancy of the informant's occupation, the right of the witness to be free from self-incrimination must be balanced against defendant's right to a substantial defense. In the present case, defendant was not deprived of any right to present a defense by the informant's failure to answer the question regarding her occupation. The elements of possession with intent to deliver between 50 and 449 grams of cocaine are: "(1) the defendant knowingly possessed a controlled substance; (2) the defendant intended to deliver this substance to someone else; (3) the substance possessed was cocaine and the defendant knew it was cocaine; and (4) the substance was in a mixture that weighed between 50 and [449] grams." People v Crawford, 458 Mich 376, 389; 582 NW2d 785 (1998). Intent to deliver need not be established with proof of actual delivery of narcotics. People v Wolfe, 440 Mich 508, 524; 489 NW2d 748, amended 441 Mich 1201 (1992). "An actor's intent may be inferred from all of the

facts and circumstances, and because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient." *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998) (Citations omitted). Intent to deliver can be inferred from the quantity of narcotics in the defendant's possession, the manner in which the narcotics are packaged, and other circumstances surrounding the arrest. *Wolfe, supra*.

In the present case, a police record indicated that three and one-half grams of cocaine were recovered. That record was countered by other police documentation and testimony from police officers at trial that he was found with three and one-half ounces of cocaine. Accordingly, there was contradictory evidence in the trial record regarding the amount of drugs recovered from defendant's person. Moreover, the quantity of cocaine was not divided, and defendant was not found in possession of a scale at the time of arrest. Consequently, the defense had sufficient information to refute the intent to deliver, irrespective of the informant's alleged occupation. Therefore, defendant was not deprived of a substantial defense when the trial court ruled that the occupation was irrelevant and violated the informant's right to be free from self-incrimination. Furthermore, the burden of proof was not shifted in light of the evidence available to dispute the intent to deliver. Accordingly, this claim of error is without merit.

Defendant's second argument on appeal is that prosecutor's explanation that the OMNI members "prepared for the possibility that he may be armed" constituted prosecutorial misconduct. We disagree. Unpreserved claims of prosecutorial misconduct are reviewed for plain error. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). To meet the requirements of the plain error rule, three elements must be satisfied: (1) error must have occurred; (2) the error must be plain; and (3) the plain error affected substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). The third requirement is satisfied by demonstrating prejudice; specifically that the error affected the outcome of the lower court proceedings. *Id*.

Generally, prosecutors are afforded great latitude in their arguments. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Rice (On Remand)*, 235 Mich App 429, 434-435; 597 NW2d 843 (1999).

Prosecutorial misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context to determine whether the defendant was denied a fair and impartial trial. [*Id.* at 435.]

that the amount found on the form was consistent with personal use, no requiring testimony from defendant.

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¹ Defendant asserts that the burden of proof was shifted because he was forced to take the stand to testify that he went to the informant's apartment for commercial sex. This contention is without merit. As stated above, defendant relied on the police form to assert that he was merely found with three and a half grams of cocaine on his person. Defense counsel could have argued that the amount found on the form was consistent with personal use, not delivery, without

During an opening statement, a prosecutor states the facts that counsel believes will be proven at trial, but should not reference evidence that is clearly inadmissible at trial. MCR 6.414(C); *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001).

The prosecutor's statement regarding the OMNI members' preparation before defendant arrived was supported by evidence at trial when Detective McDonald and Lieutenant Davis testified that they prepared for the possibility that defendant would arrive with a gun. This evidence was relevant to the weapons charges against defendant. However, the prosecutor did not seek to elicit any testimony that defendant had a habit for carrying a gun or reputation for dangerousness. Therefore, the prosecutor's opening statement did not deny defendant a fair and impartial trial because he did not reference clearly inadmissible propensity evidence under MRE 404(b).² Moreover, the trial court instructed the jury that the attorneys' statements and arguments were not evidence. Given that jurors are presumed to follow the trial court's instructions, this instruction would have eliminated any potential for prejudice from the prosecutor's remark. *People v Dennis*, 464 Mich 567, 581-582; 628 NW2d 502 (2001); *People v Rodriguez*, 251 Mich App 10, 30-31; 650 NW2d 96 (2002).

Defendant also claims that the OMNI members' references to their preparation for the possibility that defendant would carry a gun and the fact that he had been investigated for drugs in the past denied him a fair trial. We disagree. This Court reviews defendant's unpreserved claim regarding the preparation for the possibility that defendant would carry a gun for plain error. *Carines*, *supra* at 766-768. However, we review defendant's preserved claim regarding past investigations for a clear abuse of discretion. *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000).

Police officers have a special duty not to make prejudicial and irrelevant remarks during their testimony. *People v Holly*, 129 Mich App 405, 415-416; 341 NW2d 823 (1983). Such remarks may include generally inadmissible testimony, such as other crimes, wrongs, or acts of a defendant. *Crawford, supra* at 383; MRE 404(b).

For the reasons stated above, the OMNI members' testimony regarding their preparation for the possibility that defendant would carry a gun was admissible and not prejudicial. Therefore, it did not affect defendant's substantial rights.

Pursuant to MRE 404(b), however, the reference to past investigations of defendant for drugs may have been construed by the jury to indicate that defendant had a propensity to commit drug crimes. Thus, it may have violated the special duty not to make prejudicial remarks during

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² It is important to note that testimony from Lieutenant Davis indicated that defendant had been investigated for drugs. Defendant objected to this statement, and the trial court advised the jury to disregard the statement. However, there was no testimony elicited regarding prior investigations for gun charges. Furthermore, although the prosecutor inquired regarding the preparation taken before defendant's arrival at the apartment, the prosecutor did not attempt to elicit any evidence regarding the carrying of a weapon. Defendant did not object to the testimony that the officers prepared for the possibility that defendant may have a weapon on his person.

testimony. Nevertheless, the reference was harmless. Defendant's trial counsel objected to the statement, and the trial court advised the jury to disregard it. Because jurors are presumed to follow an instruction to disregard inadmissible evidence, it is reasonable to conclude that any possible prejudice from the past investigation for drugs reference was cured by the cautionary instruction. *Dennis, supra* at 581-582.

Defendant's third argument on appeal is that the trial court erred when it failed to sua sponte grant a mistrial in response to evidence of the OMNI members' preparation for the possibility that defendant would carry a gun and evidence that defendant had been investigated for drugs in the past. We disagree. This Court reviews defendant's unpreserved claim that a mistrial was warranted for plain error. *Carines, supra* at 766-768.

A sua sponte decision to grant a mistrial "is within the sound discretion of a trial judge." *People v Clark*, 453 Mich 572, 581 n 6; 556 NW2d 820 (1996). Such a decision is allowable if "justice . . . cannot be achieved without aborting the trial" *Id.*, citing *People v Henley*, 26 Mich App 15, 29; 182 NW2d 19 (1970). Furthermore, a trial court should avoid declaring a mistrial sua sponte without first finding that no reasonable alternative exists. *People v Rutherford*, 208 Mich App 198, 202; 526 NW2d 620 (1994). The reference to the OMNI members' preparation was not inadmissible propensity evidence and did not prejudice defendant's right to a fair trial. The reference to past drug investigations was remedied with a cautionary instruction. Therefore, justice could be achieved without a mistrial in this case.

Next, defendant claims his trial counsel was ineffective because he failed to: (1) move for a mistrial or file a motion in limine to exclude defendant's past drug investigations, (2) object or move for a mistrial or to move in limine to exclude evidence of the OMNI members' preparation for defendant to carry a gun, (3) challenge the chain of custody for the cocaine admitted into evidence, and (4) properly estimate defendant's minimum sentencing guidelines range when defendant considered and rejected a plea offer from the prosecutor. We disagree. The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v Grant*, 470 Mich 477, 484; 684 NW2d 686 (2004). The court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *Id.* The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.* at 484-485.

Michigan has adopted the ineffective assistance of counsel standard established by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). *Grant, supra* at 485. Generally, "this Court will not second-guess counsel regarding matters of trial strategy, and even if defense counsel was ultimately mistaken, this Court will not assess counsel's competence with the benefit of hindsight." *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Effective assistance is strongly presumed and the reviewing court should not evaluate an attorney's decision with the benefit of hindsight. *Grant, supra* at 485; *Toma, supra* at 302. To demonstrate ineffective assistance, a defendant must show: (1) that his attorney's performance fell below an objective standard of reasonableness, and (2) that this performance so prejudiced him that he was deprived of a fair trial. *Grant, supra* at 485-486. Prejudice exists if a defendant shows a reasonable probability that the outcome would have been different but for the attorney's errors. *Id.* at 486.

Defendant's ineffective assistance claims of his trial counsel's failures with regard to the evidence of past drug investigations of defendant and the OMNI members' preparation for the possibility that defendant would carry a gun are without merit. Although trial counsel admitted at the *Ginther*³ hearing that he was tired and focused on another case, defendant has not demonstrated a reasonable probability that the outcome would have been different but for his trial counsel's distractions. The comment regarding past drug investigations was stricken from the record after defense counsel objected. Moreover, in context, the testimony regarding preparing for the possibility that defendant may be carrying a gun was not improper. Rather, the testimony at this trial was seemingly admitted as part of police procedure and to explain why defendant was "tasered" when he reached into his pocket. In the presence of police, the informant made a telephone call for three and one-half ounces of cocaine, and the drugs were presented at trial. Defendant telephoned when he was on his way to the informant's apartment with the drugs. When taken into custody at the apartment, drugs and a gun were found on defendant. For the reasons stated above, there was substantial evidence of defendant's guilt presented at trial.

Defendant next claims that his trial counsel was ineffective because he failed to challenge the chain of custody for the cocaine admitted into evidence.

Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy. Further, "a defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy, and he must show that, but for counsel's error, the outcome of the trial would have been different." [*People v Davis*, 250 Mich App 357, 368-369; 649 NW2d 94 (2002) (Internal citations and quotation omitted).]

Defendant's trial counsel challenged the amount of cocaine recovered from defendant at the informant's apartment. The trial court noted that counsel effectively scrutinized discrepancies between Detective McDonald's testimony that defendant carried three and one-half ounces of cocaine and a written OMNI record listing three and one half grams recovered. Furthermore, trial counsel interrogated the informant regarding a statement she allegedly made during an interview that she "was amazed that three-and-a-half is what they said was in [defendant]'s possession." Defendant does not present facts suggesting an error in the chain of custody. If no such errors existed, trial counsel reasonably may have concluded that a challenge to the chain of custody would have distracted the jury from the aforementioned challenges to the cocaine. In fact, trial counsel's inquiry into chain of custody may have definitively demonstrated that the police report containing the three and one-half gram reference was the result of human error. This Court will not second-guess trial counsel's strategy. *Davis, supra* at 368-369. Thus, defendant fails to overcome the strong presumption that this strategy fell within an objective standard of reasonableness. *Grant, supra* at 485-486.

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³ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Defendant's final claim of ineffective assistance is that his trial counsel miscalculated the minimum sentencing guidelines range for his cocaine charge, thereby affecting his decision to reject the prosecutor's plea offer.

Defendant fails to meet his burden of establishing that counsel's performance fell below an objective standard of reasonableness and that resulting prejudice deprived him of a fair trial. *Grant, supra* at 485-486. Review of the record reveals that the deadline for plea or sentence agreements had passed. Despite that fact, the trial court instructed the prosecutor to place the proposal on the record. The trial court then noted that defense counsel briefly calculated the sentencing guidelines to conclude that the minimum guideline range was 45 to 93 months. However, the trial court proceeded to advise defendant that the prosecutor and the probation department also had the right to score the guidelines, "[a]nd depending upon how the ... Court handled any arguments on particular issues, there's really no telling until we did a presentence investigation report to know for sure what the guidelines would be." The trial court then advised defendant that the guidelines could be calculated differently, and the court could then fashion a sentence different than the recommended guidelines range.

Ultimately, the actual guidelines range calculated by the trial court was 78 to 195 months. Defendant cites his own self-serving testimony that he would have accepted the plea offer because of the disparity between these ranges and the risk that he could be imprisoned for 195 months. However, defendant provides no objective evidence that he would have accepted the prosecutor's plea offer if advised differently. Following a Ginther hearing, the trial court held that the calculation of the sentencing guidelines did not provide a meritorious issue for The trial court held that, irrespective of any testimony regarding ineffective assistance. distractions or lack of sleep, defendant was specifically advised by the court of the time passage for plea agreements and that the sentencing guidelines would vary if all parties had the opportunity to examine the guidelines in depth. Furthermore, defendant was advised when he rejected the plea offer that his sentence, if convicted, could vary from trial counsel's 45 to 93 month estimation. Defendant received this warning from both the trial court and his trial counsel on the record. Defendant acknowledged these warnings on the record and decided to pursue trial. Thus, the trial court held that counsel had not rendered ineffective assistance. We cannot conclude that the factual findings were clearly erroneous in light of the extensive advice given to defendant regarding the variances in the calculation of the sentencing guidelines, and the trial court's discretion in resolving challenges to the guideline calculations. Grant, supra. On this record, defendant failed to meet his burden of establishing a claim of ineffective assistance.

Defendant's last argument on appeal is that the sentence imposed, 195 month to 40 years in prison, which fell within the minimum sentencing guidelines range of 78 to 195 months, was unconstitutionally harsh because the trial court noted that its sentencing practices were harsher before the Legislature's sentencing guidelines were enacted. Although defendant frames this issue as constitutional, merely framing an issue as constitutional does not create such an issue. *People v Weathersby*, 204 Mich App 98, 113; 514 NW2d 493 (1994). Under MCL 769.34(10), this Court may not consider challenges to a sentence based exclusively on proportionality, if the

sentence falls within the guidelines range. *People v McLaughlin*, 258 Mich App 635, 670-671; 672 NW2d 860 (2003); *People v Pratt*, 254 Mich App 425, 429-430; 656 NW2d 866 (2002). We therefore affirm defendant's sentence.

Affirmed.

/s/ Richard A. Bandstra

/s/ Christopher M. Murray

/s/ Karen M. Fort Hood